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No. 91 313

In The

Supreme Court of the United States

October Term, 1991

LARRY DODSON, ET AL,
Petitioners,
-vs-
DENNIS HAZEN HUGULEY, ET AL,
Respondents,
-and-
GENERAL MOTORS CORPORATION,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

ISSUE I

WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S ENTRY OF THE PROPOSED SETTLEMENT DECREE, WHICH PROVIDED FOR RELIEF PROPORTIONATE TO (1) THE ANTICIPATED RELIEF SHOULD PLAINTIFFS PREVAIL, AND (2) THE LIKELIHOOD OF SUCCESS?

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF FACTS

In July, 1983, respondents filed their first complaint (R.1: Complaint), in this race discrimination class action, with the United States District Court for the Eastern District of Michigan; the case was assigned to the Honorable John Feikens. Respondents' present counsel, Lopatin & Miller, P.C., was substituted as counsel for the putative class in May, 1985 (R.91: Appearance); Reosti & Hayes, P.C. filed as co-counsel in September, 1985. (R.95: Appearance as Co-counsel)

The Third Amended Complaint, the operative complaint in this litigation, was filed on February 24, 1986. At that time, the named plaintiffs were Dennis Huguley, Larry Kitchen, James Kennedy and Larry Dodson.

(R.126: Plaintiffs' Third Amended Complaint) This complaint charged that defendant-appellee (hereafter, defendant) General Motors discriminated against black salaried employees in Michigan, Indiana and Ohio, through the operation of its performance appraisal system, with regard to salary, promotional and other employment opportunities. (*Id.*)

The trial court certified the class through his opinion and order on July 21, 1986, and October 16, 1986, respectively. (R.154: Opinion; R.170: Order of Certification) The order certified a class of approximately 9800 persons who were: (1) black; (2) classified salary employees of defendant General Motors; (3) in the Michigan, Indiana and Ohio area; (4) employed between October 8, 1982 and September 25, 1986. (*Id.*)

Thereafter, the parties conducted extensive discovery, including eighty-seven (87) depositions and voluminous research and statistical analysis concerning over 100,000 computerized personnel files. (R.513: Response to Motion to Substitute Attorneys) Respondents' counsel has advanced over $200,000 in costs. (*Id.*) During this time, with some interruption, the parties conducted lengthy and complex negotiations.[1]

On October 21, 1988, three weeks before the scheduled trial, the parties reached an agreement in principle. (R.515: Memorandum Opinion Approving Consent Decree) The trial was adjourned to allow the litigants time to complete the details of the settlement, whereupon on February 1, 1989, they submitted a proposed consent decree to the court, with the approval of all four of the named plaintiffs including Larry Dodson. (R.374: Consent Decree; Dodson, Tr 6/26/89, 59) On Feb-

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[1] In litigation of this complexity, a litigation team represented each party; for ease of exposition, respondents refer to counsel or attorney in the singular.

ruary 3, 1989, the court issued its preliminary approval of the proposed Consent Decree. (R.373: Order of Preliminary Approval)

Thereafter, the class members were informed of the proposed decree, were granted access to free copies of the decree, and were invited to pose objections to the proposal over a sixty-day period, concluding on April 30, 1989. (R.463: Order Extending Time) The class members were advised of a special telephone number, connecting to paralegals and attorneys for the class, who could answer questions about the proposed decree. (James, Tr 6/26/89, 66; R.374: Consent Decree) The class' trial team handled hundreds of such inquiries during and after the objection period. (James, Tr 8/11/89, 42-43) The class counsel appeared at numerous mass meetings, called throughout the tri-state area in Detroit, Flint, Lansing, Indianapolis, and Youngstown, and continues to be available for class member meetings. (James, Tr 8/11/89, 42; Tr 5/3/89, 21)

By the end of the appeal period, 1,485 objections were filed; the vast majority were signatures on petitions. A hearing for objections was scheduled for June 26, 1989 (Status Conference 5/9/89), whereupon, on June 23, 1989, three days before the scheduled hearing, attorney Godfrey Dillard filed an appearance on behalf of named-plaintiff Larry Dodson and other objectors. (R.499: Appearance) At the hearing, approximately 200 objectors appeared, some accompanied by counsel. (Court, Tr 6/26/89, 6) For purposes of the hearing, at his request, Dillard was allowed by the court to speak for those objectors present without counsel. The court took the decree under advisement.

At the time of the hearing, over objections, the parties also submitted to the court the question of whether the decree, if approved, should have an opt-out

provision. The court decided that the decree, if approved, should not have an opt-out provision pursuant to the class's certification under F.R.Civ.P. 23(b)(2) and relevant case law. (Court, Tr 6/26/89, 86)

On August 3, 1989, Dillard filed a Motion for Substitution of Attorney moving to substitute himself as counsel for the class, which was heard August 11, 1989. (R.512: Motion to Substitute) On September 1, 1989, Judge John Feikens issued an Opinion Approving the Consent Decree and an Opinion and Order Denying Attorney Dillard's Motion for Substitution of Attorney. (R.515: Memorandum Opinion and Order; R.519: Order Denying Motion to Substitute) On September 14, 1989, the court signed an Order Approving Consent Decree, as well as Order Adding as Named Plaintiffs Robert Raglin of Columbus, Ohio and Darnita Stein of Flint, Michigan. (R.520: Order Adding Plaintiffs' R.21: Order Approving Consent Decree)

The consent decree is a sixty-two page (62) document (exclusive of exhibits) providing relief to the class in the following categories:

1. A backpay distribution of up to 4.6 million dollars to approximately 2800 ex-employee class members.

2. A first year distribution of approximately one million dollars in pay raises to those approximately 1,000 present class member employees whose pay is furthest out of line with their statistical white counter-parts.

3. A group monitoring system for promotions and pay which is to be in place for five (5) consecutive years. This computerized group monitoring system will benefit not only class members, but black salaried employees that plaintiff hired since the close of the class identification period on October 8, 1986.

4. The institution of an individual monitoring system which will allow employees to appeal their performance appraisals (now called relative contribution assessment) to a separate panel partially nominated by the employees.

5. Awards to named plaintiffs, anecdotal witnesses, and potential witnesses, totaling $325,000.

6. Payment by defendant of plaintiffs' fees of approximately $457,000 and costs in excess of $200,000.

On October 12, 1989, Dillard filed the Joint Notice of Appeal of the Order Approving Consent Decree of September 14, 1989. (R.522: Appeal Notice) No Notice of Appeal has been filed regarding the Order Denying Motion for Substitution of Counsel. To date, there has been no motion to intervene filed on behalf of any unnamed plaintiff. On November 20, 1989, attorney William Hawkins of Indianapolis, Indiana also filed an appearance on behalf of named plaintiff Dodson.

On November 2, 1989, respondents filed, *inter alia*, a Motion to Strike All or Part of Joint Notice of Appeal. This motion challenged: (1) the standing of any class member except Larry Dodson to prosecute an appeal in this case; (2) Dillard's authorization to prosecute an appeal on behalf of any objector other than Dodson; and (3) the standing of persons named in Dillard's appeal who had not filed objections, were not class members, or were duplicates. On January 22, 1990, the court granted respondents' motion in part, striking all nonobjectors, nonclass members and duplicate names, and directing Dillard to set forth in his opening brief, the authority by which he claims to represent plaintiffs-objectors on appeal.

On April 26, 1990, attorney William Hawkins and named plaintiff Larry Dodson filed documents dis-

missing Dillard and substituting William Hawkins as counsel for Dodson. To date, Dillard nas produced no written statements of objectors authorizing him to represent them on appeal. Attorney Hawkins has produced thirty (30) such statements, including that of Mr. Dodson; of these, four (4) are unsigned and five (5) are those of persons who have no filed objections.

On February 22, 1991, the United States Court of Appeals for the Sixth Circuit issued a *per curiam* opinion, affirming the trial court. The court below acknowledged that respondents had challenged the objectors standing to challenge the consent decree. Nevertheless, the court declined to address the standing issue, because it found that the merits of the issues raised were wholly without merit. (Opinion, 3) The court cautioned that its assumption of standing "is without consequence and should not be construed as a decision on the merits of the standing issue." (Opinion, 4)

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REASONS FOR DENYING THE PETITION FOR CERTIORARI

ISSUE I

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE TRIAL COURT'S ENTRY OF THE PROPOSED SETTLEMENT DECREE, WHICH PROVIDED FOR RELIEF PROPORTIONATE TO (1) THE ANTICIPATED RELIEF SHOULD PLAINTIFFS PREVAIL, AND (2) THE LIKELIHOOD OF SUCCESS.

A. Introduction

Respondents perceive appellants as raising two objections, each of which is addressed. First, the trial court properly found that it was empowered to exercise its discretion not to insert an opt-out provision. Second, in view of the relief accorded by the consent decree, the potential award at trial, and the likelihood of success if this action were to proceed to trial, the trial court acted within its discretion in approving the consent settlement.

B. The Trial Court Acted Within Its Discretion In Denying Respondents' Request For An Opt-Out Provision.

Respondents sought certification under F.R.Civ.P. 23(b)(2) — not F.R.Civ.P. 23(b)(3). (R.144: Plaintiffs' Corrected Reply to Defendant's Supplemental Memorandum in Opposition to Class Certification; R.126: Third Amended Complaint, ¶ 33) Therefore, the trial court recognized, in certifying this case as a 23(b)(2) class, "Plaintiffs seek certification pursuant to Rule 23(b)(2) .... Accordingly I need not address the requirements of Rule 23(b)(3), (c)(2)." *Huguley* v. *General Motors Corp*, 638 F.Supp. 1301, n.1 at 1302 (E.D.Mich. 1986).

Undoubtedly, the trial court properly certified this class action pursuant to F.R.Civ.P. 23(b)(2). Indeed, the petitioners conceded this (Petition for a Writ of Certiorari to the United States Court of the [*sic*] Appeals for the Sixth Circuit, 25):

> "The Appellants [petitioners] acknowledge that this case was properly certified as a (b)(2) class action. Subsection (b)(2) contemplates class cases seeking equitable injunctive or declaratory relief, and back pay comes within the ambit of (b)(2) because the 'demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion.' *Johnson* -v- *Georgia Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969). See also *Pettway* -v- *American Cast Iron Pipe Co.*, 494 F.2d 211, 256-257 (5th Cir. 1974) (*Pettway III*), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979)."

Petitioners correctly state the law in this regard. It is well established that a Title VII class action seeking back pay is properly certified under Rule 23(b)(2). *E.g.*, *Alexander* v. *Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, AFL-CIO*, 565 F.2d 1364, 1372 (6th Cir. 1977), *cert. denied* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d (1978); *Senter* v. *General Motors*, 532 F.2d 511, 525 (6th Cir. 1976), *cert. denied* 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976).

Accordingly, the trial court's decision not to grant an opt-out provision must be reviewed in the context of a class action certified under F.R.Civ.P. 23(b)(2). F.R.Civ.P. 23(b)(3) is simply irrelevant to this issue.

In express terms, F.R.Civ.P. 23(c)(2) requires an opt-out provision, only in a suit certified as a (b)(3) action,

not in a suit certified under Rule 23(b)(2). *Alexander* v. *Aero Lodge*, 565 F.2d at 1373 ("The mandatory notice provision of Rule 23[c][2] [containing notice of the right to opt out] is expressly confined by its terms to actions under [b][3], and a number of courts have indicated that actual prejudgment notice is not required by Rule 23 in actions certified under sections other than [b][3].") Similarly, no decision holds that an opt-out mechanism is essential in a rule (b)(2) case. *Laskey* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)*, 638 F.2d 954, 956-957 (6th Cir. 1981); *King* v. *South Central Bell Telephone & Telegraph*, 790 F.2d 524, 530 (6th Cir. 1986); *Dosier* v. *Miami Valley Broadcasting Corp*, 656 F.2d 1295, 1299 (9th Cir. 1981). Indeed, in *Laskey*, the Court squarely held that opt-out is not required, even in a case combining aspects of a Rule 23 (b)(2) class action and a Rule 23(b)(3) action. *Id.*, 956-957.

> "The notice of the pendency of the class action stated that all members would be bound and that each had the right to retain independent counsel and intervene as a plaintiff. This class action could be either brought under Rule 23(b)(2), Fed.R.Civ. Pro., which does not have the right to opt out, or under Rule 23(b)(3). In the interests of judicial economy and efficiency, the courts should treat the class as a Rule 23(b)(2) class. Thus, the failure to notify the class members of the right to opt out of the class is not a violation of due process." (Citations omitted)

Not only is there no requirement that an opt-out mechanism be provided in a (b)(2) action, there is dispute regarding whether the opt-out mechanism is permissible, with the circuit courts of appeal split on this issue. *Plummer* v. *Chemical Bank*, 668 F.2d 654, n. 2 at

657 (2nd Cir. 1982). On one point, however, there is no dispute: in a (b)(2) action, there is certainly no automatic right to an opt-out provision. *Laskey*, 638 F.2d at 956; *Penson* v. *Terminal Transport Co, Inc*, 634 F.2d 989, 993-994 (5th Cir. 1981); *Grigsby* v. *North Mississippi Medical Center, Inc*, 586 F.2d 457, 461 (5th Cir. 1975); *U.S.* v. *U.S. Steel Corp*, 520 F.2d 1043, 1057 (5th Cir. 1978), *cert. denied* 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1977).

The remaining question, then, is whether the trial court, assuming that it is empowered to provide an opt-out mechanism in a (b)(2) action, abused its discretion in denying respondents' request for opt-out. Respondents did request an opt-out provision from the trial court, however they recognize that the trial court acted within its discretion in denying the request.

In *Kincade* v. *General Tire & Rubber Co*, 635 F.2d 501, 507 (5th Cir. 1981), the court gave three reasons for holding that "the right to opt-out, which is denied when a Rule 23(b)(2) class is tried, also need not be provided when such a case is settled." First, Rule 23 certification procedure ensures that the named parties will adequately represent the class. Second, F.R.Civ.P. 23(e), requiring court approval of all dismissals or compromises, gives additional judicial protection to the class members. Third, the public policy in favor of settlement is served by barring objectors from opting out. Here, where the trial court exercised its discretion in denying an opt-out provision, the *Kincade* reasoning serves to illuminate the basis for the trial court's decision.

Similarly, *Laskey*, 638 F.2d at 956, held that the procedures associated with a (b)(2) class action, with no opt-out mechanism, are preferred, stating, "In the interests of judicial economy and efficiency, the court should treat the class as a Rule 23(b)(2) class." *Accord: Wetzel* v. *Liberty Mutual Ins Co*, 508 F.2d 239, 253 (3rd Cir. 1975),

cert. denied 421 U.S. 1011, 95 S.Ct. 721, 54 L.Ed.2d 753 (1975) (holding that a Title VII action seeking injunctive, declaratory, and monetary relief which could be maintained "under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3) which serve no useful purpose under (b)(2).")

In *Laskey*, 638 F.2d at 957, the court noted that a trial court's acceptance of a settlement is discretionary, subject to reversal only if there is an abuse of discretion.

> "The acceptance of a settlement in a class action suit is discretionary with the court and will be overturned only by a showing of abuse of discretion. *See Grunin* v. *International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); *Cohen* v. *Young*, 127 F.2d 721, 724-25 (6th Cir. 1942)."

Indeed, even where the named representatives of the class object, the reviewing court will affirm if no abuse of discretion is demonstrated. *Id.*

> "Accepting a settlement over the objections of the named representatives is not necessarily an abuse of discretion. *See Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir.), *cert. denied*, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974); *Mungin*, *supra*, 318 F.Supp. at 731."

In *Spalding* v. *Spalding*, 355 Mich. 382, 384-385; 94 N.W.2d 810 (1959), the Michigan Supreme Court explained the "abuse of discretion" standard:

> "Where, as here, the exercise of discretion turns upon a factual determination made by the trier of facts, an abuse of discretion involves far more than a difference in judicial opinion between the

> trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

Although respondents urged the trial court to mandate an opt-out provision in the decree, respondents cannot reasonably contend that the trial court's exercise of discretion was so unreasonable as to constitute an abuse. There are almost 10,000 individuals in this class. If an opt-out mechanism is established, with even one percent of the class opting out, the trial court would be burdened with 100 additional cases. Thus, the trial court could reasonably conclude that the concerns for judicial economy and efficiency which originally lay behind its certification order would be largely destroyed by an opt-out clause.

Moreover, the complexity of the proposed consent decree arguably makes an opt-out procedure less warranted. The decree provides class-wide relief, that cannot be partitioned between the opt-ins and the opt-outs. (Court, Tr 6/26/89, 82) Individuals who choose to opt out would receive a free ride, gaining the benefit of the class-wide relief, such as group monitoring, *without* giving up their own claims for back pay, unlike their fellow class members who would give up these claims. Indeed, the trial court may have anticipated that the benefit of opting out — to have your cake and eat it too — could prove too attractive. Possibly, so many individuals would opt out as to undermine the entire settle-

ment process, even though the settlement is intrinsically fair and equitable. Accordingly, respondents respectfully submit that the trial court acted within its discretion in approving the settlement and must be affirmed.

It remains only to explicitly address and repudiate petitioners' contention that "the Sixth Circuit's decision in this case is in conflict with the Eleventh Circuit's," citing *Cox et al.* v. *American Cast Iron Pipe Co*, 784 F.2d 1546 (11th Cir. 1986). In *Cox*, two weeks after the class was certified, the judge resigned from the bench. Thereafter, the second judge authorized the defendants to notify the class members of a right to opt out. A third judge then assumed responsibility for the case and approved the opt-out procedure. The appellate court reversed, finding that the trial court had abused its discretion in approving the opt-out notice. Although some language within *Cox* serves petitioners, the language is, at most, dicta. The *Cox* court reversed the trial court, which had approved an opt-out procedure.

Petitioners also rely on *Holmes* v. *Continental Can Co*, 706 F.2d 1144 (11th Cir. 1983). There is no fundamental dispute between *Holmes* and the opinion below. The trial court below recognized its discretion to allow opt-out; however, upon an examination of the specific facts and circumstances of this action, the trial court declined to permit opt-out. The appellate court below affirmed this exercise of discretion. *Holmes* demands that the trial court exercise its discretion; it does not mandate an opt-out procedure.[2] The *Holmes* court noted, 706 F.2d at 1155:

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[2] The *Holmes* facts are radically different from those of this action. First, dissenters challenged the disproportionate payments to the named plaintiffs, contrary to the facts in this action. More

(*concluded on page 14*)

> "This court in *Penson* held that a district court 'acting under its Rule 23(d)(2) discretionary power, may require that an opt-out right and notice thereof be given should it believe that such a right is desirable to protect the interests of the absent class members.' 634 F.2d at 994. A district court's decision would only be reversed for abuse of discretion."

Petitioners announce a conflict between the Sixth Circuit's affirmance of the trial court and the Eleventh Circuit, although there is no such conflict. The trial court assumed that it had the discretion to include an opt-out provision, exercised its discretion, and declined to include the provision. The appellate court below affirmed, finding no abuse of discretion. At bottom, petitioners advocate a rule that mandates an opt-out provision whenever the case involves any monetary relief, regardless of the significance of the monetary relief. This is not the rule promulgated in *Holmes*, *Cox*, or any other decision of the Eleventh Circuit. Predicated upon its extensive review of the facts before it, the trial court declined to grant an opt-out option; there was no abuse of discretion; the issue raised by petitioners is not worthy of this Court's review.

(*continued from page 13*)

importantly, this action seeks and achieves (if the settlement decree stands) prospective relief with regard to promotion and merit pay, which far outweighs the monetary award for historical disparities. In *Holmes*, the action *de facto* involved only monetary relief, "[b]ecause the plants at which the bulk of the class and all of the named plaintiffs and objecting class members worked [had] been permanently closed." *Holmes*, 706 F.2d at 1146, n.1.

C. The Trial Court Properly Exercised Its Discretion In Approving The Consent Decree, In View Of The Specific Relief Provided By The Decree And The Likelihood Of Respondents Prevailing If No Settlement Is Reached.

The trial court found that the primary objection to the substantive provisions of the consent decree was that the monetary relief was inadequate. (R.515: Opinion, 9) Otherwise, the objections to the monitoring or affirmative relief were "largely conclusionary," and on the whole, "were stated in broad form and not precisely defined." (*Id.*, 14) A review of appellants' arguments to the court below, as to why the monetary and affirmative relief provided by the consent judgment is inadequate (Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 39-45), confirms the trial court's opinion. Although petitioners appear to have abandoned some of their arguments, the Consent Decree can be evaluated only by consideration of all of its parts. Moreover, petitioners' argument for opt-out necessarily relies on the monetary relief aspect of this action, making this discussion pertinent to the discussion, *supra*, on the trial court's decision not to include an opt-out provision.

Adequacy of Monetary Relief

Petitioners complained to the appellate court below that the monetary relief is inadequate. (Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 39) They did not, however, raise any specific objection to the distribution formulas used for allocating either the ex-employee fund or the incumbent employee awards. (Tr 6/27/89, 27) The adequacy of the monetary relief must be judged by examining the likelihood of success and the potential recovery if respondents should prevail.

Probability of Success

Petitioners argued below, based on the preliminary report of plaintiff's expert, Dr. Michael Thomson, that respondents would have prevailed. Such certainty is the province of armchair quarterbacks. Defendant's memorandum in support of approval of the consent decree (R.503) fully explained the uncertainty regarding the ultimate result, in the absence of a settlement.

Dr. Thomson's preliminary report was exactly that, preliminary. Although it described differences in the performance evaluations of black and white employees, it did not analyze the effect of performance levels on merit increases or promotions. It is precisely these effects which are the central focus of this case. Following the preliminary analysis, Dr. Thomson conducted additional statistical analysis. These studies were multiple regression analyses which used education, age, and tenure as the principal predictors (factors) for determining salary levels. Dr. Thomson performed several multiple regressions to test the difference between black and nonblack employees in discretionary salary increases and promotion rates. These results indicated the strengths and weaknesses of respondents statistical evidence of discrimination.

Respondents did not argue to the trial court, and do not argue here, that these statistical results were so weak that respondents settled this case for fear of losing the liability issue. In fact, respondents settled this case, because the settlement benefits to the class were substantial and were a very high proportion of the potential recovery (as explained below). Nevertheless, respondents necessarily considered the possibility that additional data regarding pre-employment work experience, starting salary, starting job category, and career path, might narrow the statistical differences found by Dr. Thomson.

More disturbing, however, were the studies performed by Dr. Thomson to test the connection between performance evaluation and merit pay and promotion. To some extent, these results were consistent with defendant's claim that there is no direct correlation between performance evaluations and promotions. Although respondents were certainly unwilling to concede defeat (nor was defendant prepared to proclaim victory), the results did present problems, especially in light of this Court's opinion in *Watson* v. *Fort Worth*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

These initial concerns have been, of course, magnified by this Court's subsequent decision in *Wards Cove Packing Co* v. *Antonio*, ___ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). In a disparate impact case, these decisions require proof of a nexus between the disparate statistical results and an identifiable employment practice.

Defendant, in its memorandum to the trial court, included a long list of reasons why respondents' case might fail, in the absence of settlement. Although respondents did not, and do not agree with defendant's analysis, respondents must accept the possibility that defendant might prevail on one or more of its defenses, if this action were tried.

Respondents would have, for instance, as defendant observed, been required to concede that performance evaluations systems are a useful business tool in making personnel decisions. Respondents would also have to concede that defendant's performance evaluation system was sophisticated, representing the "state of the art." While not agreeing that such admissions would necessarily have led to defeat, in light of the Supreme Court's decision in *Wards Cove*, it is inescap-

able that respondents would face significant uncertainty with regard to the ultimate result.[3]

Potential Recovery

The relief negotiated for the class represents a substantial percentage of the possible recovery if respondents had prevailed. Because the actual total recovery would depend on the outcome of thousands of individual claims hearings,[4] it is impossible to estimate the actual total recovery to class members. However, it is possible to statistically estimate the total amount of the difference in salary growth for black and white employee which could be attributed to race, as opposed to education, age, tenure, etc. This would arguably equal the total amount of money lost by the class during the years in question, as a result of discrimination in merit pay and promotions.

As explained in Plaintiff's Answer to Common Objections to the Proposed Consent Decree (R.501), this estimate was based "on multiple regression analysis of the difference in the growth in salaries for black employees compared to the growth in salaries of comparable white employees, during the period covered by this case. Comparability was defined in terms of age, education, company seniority, and to a limited extent company experience." (*Id.*, 2) Petitioners do not complain that this method underestimates the potential recovery.

Petitioners simply reject respondents conclusion that the amounts provided in the consent judgment are a

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[3] The decision in *Wards Cove Packing Co* v. *Antonio*, ___ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), appears to allow the defendant to defeat a *prima facie* case of disparate impact by a lesser showing of business necessity.

[4] The numer of individual claims hearings that would be necessary if plaintiffs prevailed is an additional factor which supports the decision to settle the case.

"substantial percentage of Defendant's total exposure. . . ." (*Id.*, 3) In other words, the objectors believe that the potential recovery is many times the amount negotiated by the class representatives.

Petitioners fail to understand that the difference in merit pay, while statistically significant, involves a fraction of a percentage point. Further, while promotions are individually worth much more than merit pay increases, they are, relatively speaking, rare events. Petitioners have not contested these assertions. However, although they apparently accept the analysis as reasonable, they continue to assert that trial would necessarily result in a recovery to the class, which make the amounts obtained through the consent judgment inadequate. This is unexplainable.

Dr. Michael Thomson's estimates of the potential recovery to the class, should respondents prevail on liability, indicated that the amounts negotiated for the class was a substantial percentage of the estimated potential recovery as described above.

Merit increases are generally in the range of four to six percent for all employees. A difference of .002 or two tenths of one percent in the merit increases of black and white employees would be highly significant. However, this difference would amount to a difference of only $70.00 in anual salary, based on an annual salary of $35,000.00.

The impact of being passed over for promotions is obviously much greater. Respondents' studies showed that promotions would, on average, increase an employee's salary between $2,000 and $3,000 (depending on the year in which the promotion occurred). However, promotions were rare events. In any year, excluding automatic, nondiscretionary promotions, less than ten percent of the employees would be promoted. A differ-

ence of two percent in promotion rates would be highly significant. However this would result in a shortfall of only approximately 150 promotions which should go to black employees.

In addition to overestimating the potential recovery at trial, appellants have also understated the actual recovery in the consent decree, by ignoring or misstating two other important facts.

First, with regard to the ex-employees, although there are approximately 2,800 former employees, only a small minority were present for the entire period covered by the lawsuit. In fact, there were less than 5,000 years of service for this subgroup, an average of less than 1.8 years. Thus, although the average recovery is $571.00 (see, Appellant's Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit, by Godfrey J. Dillard], 3), this equals an average loss of $317.00 per year.

This represents a difference in the rate of salary growth, on average, of approximately .0075 percent (¾ of one percent) per year. In other words, if white salaries increased an average of six percent per year during this period and black salaries increased at a rate of 5.25% per year, then 2,800 employees with an average tenure of 1.8 years would lose approximately $1.6 million. (This amount is an overall increase, which includes both promotion and merit increases.) In only one year did the difference in rate of growth, when controlled for differences in education, age, and tenure, exceed one percent and in that year the figure was 1.16%.

The second fact that petitioners overlooked is the cumulative effect of the amount negotiated for the incumbent class. The average incumbent award is $1,000, a total of $1,000,000 for this subclass. However

this amount is added to their base salaries. A conservative estimate of the value of this fund is $10,000,000. (This excludes the effect on future percentage increases and on pensions.) As a result, the total monetary recovery is more than fifty percent of the total exposure estimated as explained above.

This award will be distributed to the fourteen percent of the class whose salaries are furthest from what would be predicted, based on the employees' education, age, tenure and company experience. The decision to distribute this fund in this manner was based on the statistical analysis which indicated that the discrimination uncovered did not affect all black employees and was primarily due to the nonpromotion of blacks at certain pay levels. Petitioners have not challenged either the concept that the consent judgment should attempt to identify the most probable victims of discrimination, nor the method chosen to accomplish this goal.

In short, the total amount negotiated on behalf of the class is a substantial percentage of the total estimated recovery. The method of distributing these amounts has not been challenged by petitioners and is eminently fair and reasonable.

Monitoring

Petitioners' other argument is that the affirmative relief is also inadequate. This argument appears to be made, because the trial court pointed to the monitoring or affirmative relief as the central justification for his approval of the consent decree. In the appellate court below, the two group of appellants (one of whom is now "petitioners") did not agree on the purported inadequacy of the affirmative relief. One group of appellants below (not petitioners) argued that it is inadequate, because it doesn't contain a specific performance evaluation scheme to replace the objectionable procedure.

This group did not contest the effectiveness of the group monitoring plan in terms of the "bottom line."

Petitioners apparently complain that the group monitoring is per se inadequate, because it is allegedly similar to the plan agreed to by the defendant and the Office of Federal Contract Compliance (OFCC). They argue that since the OFCC plan did not prevent discrimination, the group monitoring scheme cannot be expected to do so. (Hawkins Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 45; Petition for a Writ, 29) Petitioners also complain that the consent decree is inadequate, because it does not guarantee that defendant's "utilization" of minorities will "approximate minorities in the community." (Hawkins Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 46; Petition for a Writ, 29-30)

Those appellants below (not petitioners herein) were correct that the group monitoring plan cannot identify individual cases of disparate treatment, and that a balanced "bottom line" could easily include several cases of individual discrimination. However, the individual monitoring provision, ignored by appellants, addresses this problem in a realistic and forceful manner. Further, class members retain their right to sue for future individual acts of discrimination.

Respondents' experts, the statistical analysis, and the anecdotal testimony all support the conclusion that the main problem with defendant's evaluation system was not its design, but the ability of supervisors to exercise conscious and unconscious bias. The affirmative relief addresses this problem in three ways: first, the individual monitoring system will provide a means to identify individual examples of bias; second, the group monitoring sanctions provide powerful incentives to defendant to identify and correct recurring problems

stemming from supervisory bias; and, third, the class members retain their right to bring individual suits for discrimination in pay or promotion.

In fact, the individual monitoring section is a substantial change in the performance evaluation system. More importantly however, the group monitoring proposal is not only innovative but is a real breakthrough in the area of affirmative action. The system, by using computers and multiple regression analysis, allows the parties to agree on the commonly accepted "predictors" of success for large groups. Almost all experts, whether testifying for employees or employers or writing academic articles, agree that in large groups of employees, education, company experience, and prior work experience, are legitimate indicators of success within the company. The consent decree recognizes that the rewards for black and white employees should relate to these factors. And, in the event the performance evaluation system and the subsequent decisions regarding pay and promotion do not bear a statistically predictable correlation to those factors, the decisions are suspect and should be adjusted to correct the statistical imbalance. One cannot perceive of a more forceful inducement for defendant to increase its training and its own monitoring of the performance evaluation system, to insure that minorities are treated fairly.

Petitioners' complaint that the OFCC plan is substantially similar to the affirmative relief in the instant case is simply not true. The OFCC plan is based on multilevel job groups. In other words it evaluates the rate at which black and white employees are promoted to and from certain job groups. It does not address the probability that black or white employees will be in such job groups to begin with. Nor does it identify the problem of blacks being concentrated at the bottom levels of

each group. Further, to assume that this settlement will fail in achieving its objectives, because the OFCC may have failed in achieving similar objectives is not supported by evidence or logic.

Petitioners' argument that the consent judgment is inadequate because it doesn't guarantee that defendant's utilization of minorities will not approximate minorities in the community simply reflects an ignorance of the legal standards applicable to this case. See *Wards Cove*.

ISSUE II

THE COURT OF APPEALS ACTED WITHIN ITS DISCRETION WITH REGARD TO ALLOWING ORAL ARGUMENT AND WITH REGARD TO THE COURT'S CONSIDERATION OF MATTERS OUTSIDE OF THE TRIAL COURT RECORD.

In view of petitioners' cursory treatment of this issue, respondents will be brief.

Petitioners baldly assert that they were denied due process of law, because the United States Court of Appeals for the Sixth Circuit denied oral argument. Respondents are perplexed by this assertion, inasmuch as there was oral argument on January 22, 1991. Moreover, petitioners cite no authority for the proposition that there is a constitutional right to oral argument; respondents know of no such authority.

Petitioners also baldly assert that they were denied due process of law before the United States Court of Appeals for the Sixth Circuit due to the "denial of . . . documentation (National Reporting System–NRS) which would support Petitioner's and Objectors position." It appears that petitioners are contending that the court below failed to permit them to enlarge the record. Again, petitioners cite no authority for the proposition

that there is a constitutional right to enlarge the record upon appeal and require the appellate court to consider matters not raised in the trial court; respondents know of no such authority.

Moreover, petitioners did present argument to the court below with regard to the agreement between General Motors Corporation and the Office of Federal Contracts Compliance Programs. (Plaintiffs/Appellants' Brief [to the United States Court of Appeals for the Sixth Circuit, 45) Further, respondents answered petitioners argument on this subject. (Plaintiffs-Appellees' Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 41-43) Thus, the Court of Appeals below was presented with substantial information regarding the OFCC plan, notwithstanding that petitioners injected this information into this case for the first time at the appellate level.

Accordingly, respondents respectfully submit that petitioners have failed to demonstrate that the United States Court of Appeals for the Sixth Circuit acted so as to deny petitioners of due process of law; the petition for certiorari should be denied.

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RELIEF

WHEREFORE, respondents herein, DENNIS HAZEN HUGULEY et al., by and through their attorneys LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, and their attorneys REOSTI & HAYES, respectfully pray that this Honorable Court deny petitioners Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, together with costs and attorneys fees.

Respectfully submitted,

LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN AND BARTNICK

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DATE: September 10, 1991